

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E095 OF 2025

CYKA MANPOWER COMPANY LIMITED APPELLANT

VERSUS

PETER NYAMAI KEMONGO 1ST RESPONDENT

JOEL MUJUKA 2ND RESPONDENT

MECHACK O ODHIAMBO 3RD RESPONDENT

JORAM KIOKO 4TH RESPONDENT

DENIS MAKOHA 5TH RESPONDENT

ALFA WANDERA 6TH RESPONDENT

TYSON SHIKUNGA 7TH RESPONDENT

KELVIN ABWIRE 8TH RESPONDENT

LAWRENCE NYNGESA 9TH RESPONDENT

LUKE MAKORI 10TH RESPONDENT

RULING

The appellant filed an application dated 26 September 2025 seeking the court to set aside the orders issued on 22 September 2025 dismissing the appeal. The appellant is also seeking a stay of execution of the trial court judgment in Mombasa CMELRC No. E356 of 2021 pending the reinstatement and hearing of the appeal on the merits.

The affidavit of Myra Stephanie Awuor supports the application and advocates for the appellant, who avers that the appeal raises arguable grounds warranting a hearing on the merits. The lower court awarded the respondents Ksh. 9,824,161 plus costs, which is substantial, and unless the judgment is stayed to allow for the reinstatement of the appeal and hearing on merit, the appellant will suffer loss and damage.

Awuor avers that the respondents have moved the trial court to Mombasa CMELRC No. E356 of 2021 to issue a decree and tax costs in readiness for execution. If allowed to proceed, the appeal will be rendered nugatory.

The appellant is ready and willing to deposit Ksh. 1 million as security on terms as the court may direct.

Awour avers that on 30 July 2025, the appellant filed the Memorandum of Appeal and the Record of Appeal in ELRC Cause No. E095 of 2025.

On 29 July 2025, the matter was listed, and the advocate failed to appear. Notice was not issued to attend. Instead, the matter was listed for Notice to Show Cause on 22 September 2025.

The appellant followed up on the matter and instructed new advocates to attend and address the notice to show cause. On 22 September 2025, counsel attended and asked for time to go through the file on the basis that no Record of Appeal had been filed.

At the time the matter was dismissed, the Record had been filed and served on 30 July 2025. It is only fair that the appeal be reinstated and heard on merit.

The trial court judgment is for a substantial sum of Ksh. 9,824,161, and unless the same is stayed, there will be loss and damage, rendering the appeal nugatory.

In reply, the respondents filed the Replying Affidavit of Peter Nyamai Kemongo. He avers that the Supporting Affidavit by counsel for the appellant is irregular since there is no authority to address the matters therein. There is nothing in the appellant's instant application to support it.

The appellant knew the Notice to Show Cause was scheduled for 22 September 2025, but deliberately failed to disclose this to the new advocates. The appellant has never been keen to address this appeal. Initially, they were represented by Messrs Magara Dennis & Co. Advocates, G.E.O. Oduor Advocates, Oluga & Co. Advocates, and now have Nangame & Co. Advocates. This is intended to stall the appeal.

The claim was filed in 2021 and has taken 4 years to conclude. Judgment was delivered on 19 May 2025, and then, the current advocates were not on record to support the instant application. The firm of Oluga & Co. Advocates was aware of the Notice to Show Cause but failed to appear in court, resulting in the dismissal of the appeal.

On 22 September 2025, the new advocates had not formally come on record, despite being aware of the matter on 16 September 2025, as per the Notice of Change of Advocates.

Kemongo avers that the judgment of the trial court relates to 10 persons, including the respondents herein, and that the allegation that the judgment sum is substantial is incorrect. Each respondent is entitled to enjoy the fruits of his judgment.

The motion seeking a stay of execution came up in court and was compromised by consent, with the condition that the appellant would deposit half of the judgment sum in court within 30 days. To date, the appellant has not complied. To move the court to order the deposit of Ksh. 1 million would be to negate the parties' consent for no good cause and should be declined. Overall, the appellant's application lacks merit and should be dismissed with costs.

Both parties attended and made oral submissions.

Determination

The twin issues for determination are whether the appeal should be reinstated and whether judgment in **Mombasa CMELRC No. E356 of 2021** should be stayed.

A background to the instant application is that the appellant filed the Memorandum of Appeal on 4 June 2025. The appeal was against the judgment in Mombasa CMELRC No. E356 of 2021 delivered on **19 May 2025**.

The matter was allocated for mention on 28 July 2025. There was no attendance, and a notice to show cause was issued for 22 September 2025.

On the due date, parties attended, and the appellant's advocate sought time to come on record. There was no effort to address the Notice to Show Cause.

The court, taking into account that the appeal was against the judgment delivered by the trial court on 19 May 2025 and there was no Record of Appeal, under Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, the appeal had abated and thus dismissed with costs to the respondent.

On the appeal, the appellant filed the Record of Appeal on 30 July 2025.

The Notice to Show Cause issued on 28 July 2025 for the appellant to attend and address on 22 September 2025.

Under section 17 of the Employment and Labour Relations Court Act, a party has 30 days to file an appeal against the judgment and decision of the trial court.

Under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules (The Rules), an appellant is allowed 30 days to file the Memorandum of Appeal.

Under Rule 15(1) of the court Rules, a Memorandum of Appeal should be accompanied by a Record of Appeal:

(1) A memorandum of appeal shall be accompanied by a record of appeal comprising a certified copy of pleadings, the proceedings, any documentary evidence relied on, and the judgment, ruling, decision, order, decree or award appealed against.

Under Rule 15(2) of the court Rules, an appellant is allowed 60 days to file the Record of Appeal, where this is not possible at the time of filing the Memorandum of Appeal.

(2) Where the record of appeal is not filed together with the memorandum of appeal, the appellant shall file the Record within sixty days from the date of delivery of the judgment, ruling, decision, order, decree, or award appealed against.

In this regard, where the trial court delivered judgment on 19 May 2025, the 60 days to file the Record of Appeal lapsed on 11 August 2025.

The strict application of Order 50 of the Civil Procedure Rules, read with Rule 15(2) of the Court Rules, requires that the Record of Appeal be filed within the allowed timelines on 31 July 2025.

The non-attendance to show cause why the appeal should be dismissed on 22 September 2025, given the context, the appellant has no good standing with the court but has acted within its rights under the Rules.

The appeal is reinstated and shall be heard on the merits.

On the second issue, seeking a stay of execution, the respondents assert that there was an agreement to deposit 50% of the decretal sum in court. This consent is not on record. Where the consent was recorded before the trial court, this court has not had the chance to see it.

On the conditions for the grant of stay of execution, the conditions are well addressed by the courts and in the case of **Elena Doudoladova Korir v Kenyatta University [2014] KEELRC 413 (KLR)**; **Ihururu Dairy Farmers Co-operative Society Limited v Ndung'u [2022] KEELRC 3923 (KLR)**; and **West Kenya Sugar Co Ltd v Tito Lucheli Tangale [2021] KEELRC 1603 (KLR)**, that three conditions fetter an order of stay of execution of its order or decree. Firstly, the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly, the applicant must furnish security. The application must, of course, be made without unreasonable delay.

What is the substantial loss to be suffered in this case? The appellant argues that the decretal sum is Ksh. 9 million. However, there are 10 respondents, each with their own case and awards. Although the decretal sum is noted as substantial, there is no case that the respondents will not be able to refute if the appeal is addressed.

On the question of sufficient cause, the appellant has filed the Memorandum of Appeal with 8 grounds essentially challenging the findings of the trial court on the question of alleged causal employment and conversion under section 37 of the Employment Act, a challenge to conclusions that there was unfair termination of employment, and the award of claims as pleaded with costs plus interests.

The grounds of appeal raise substantial matters of law and fact which the court should address on the merits.

Regarding the security for the due performance of the judgment, once the appeal is addressed, the appellant has offered a deposit of Ksh. 1 million, while the respondents seek 50% of the Decretal sum.

To balance the right of appeal and the rights secured by the respondent through the judgment of the trial court, the appellant shall deposit 25% of Ksh. 9,824,161 in court within 14 days, closing on 20 November 2025, failure to which the order of stay shall automatically lapse and execution to proceed.

As to costs, the failure by both parties to attend court on 28 July 2025 led to the issuance of the Notice to Show Cause why the appeal should not be dismissed. The appeal would have been addressed, had it not been for this lapse. Failure to attend court when directed to do so should be abhorred. In this regard, costs shall abide by the outcome of the appeal.

Accordingly, the appeal herein is reinstated. A stay of execution of the judgment in Mombasa CMELRC No. 356 of 2021 is allowed on the condition that the appellant shall deposit in court 25% of Ksh. 9,824,161 within 14 days, closing on 20 November 2025, failure to which execution shall proceed. Costs to abide by the outcome of the appeal.

Hearing directions on the appeal to issue.

Delivered in open court at Mombasa, this 30th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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